Public Prosecutor v Abdullah bin Idris

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–71 OF 2004
JAMES FOONG, HASAN LAH AND SULONG MATJERAIE JJCA
11 MAY 2009

Civil Procedure — Jurisdiction — Court of Appeal — Whether Court of Appeal is apex court in cases originating from subordinate court — Whether Court of Appeal could review its own decision by using similar procedural provision as r 137 of the Rules of the Federal Court 1995 when it became apex court for that matter — Rules of the High Court 1980 O 92 r 4 — Rules of the Federal Court 1995 r 137

The sessions court convicted the respondent/applicant ('the applicant'), on three charges of rape and sentenced him to imprisonment and caning in respect of each of the three charges, with the term of imprisonment to run concurrently. The applicant appealed to the High Court against conviction and sentence on the grounds, inter alia, that the trial judge had delayed in writing her grounds of judgment by nearly nine years, which delay had caused a miscarriage of justice, and that there was a serious misdirection in accepting the evidence of a child witness to corroborate the evidence of the complainant. The High Court allowed the appeal and set aside the applicant's conviction and sentence. Thereafter, the prosecution appealed to the Court of Appeal, which reversed the decision of the High Court and reinstated the conviction and sentence imposed by the sessions court. As the matter originated from the subordinate court, the Court of Appeal is the apex court and there is no further right of appeal for the parties. The applicant had instead filed this application requesting the Court of Appeal to review its own decision by using its inherent powers under O 92 r 4 of the Rules of the High Court 1980 ('RHC'), which is extended to the Court of Appeal pursuant to r 4 of the Rules of the Court of Appeal 1994, to set aside the conviction of the respondent on the second charge because of a miscarriage of justice. The applicant submitted that the Court of Appeal had the jurisdiction to review its own decision under O 92 r 4 of the RHC, a similar provision as r 137 of the Rules of the Federal Court ('RFC'). The prosecution objected to this application on the grounds that the court had no jurisdiction to review its own decision or to rehear a matter that had already been finally disposed of and that the applicant's application under O 92 r 4 of the RHC could not be sustained because that order only caters for civil cases and not criminal cases such as the present one. The main issue for consideration in this application

A was whether the Court of Appeal could review its own decision by using a similar procedural provision as r 137 of the RFC when the Court of Appeal became the apex court for that matter.

B **Held**, dismissing the application:

(1) When a court such as the Court of Appeal is armed with 'residual jurisdiction' or 'implicit or implied jurisdiction' or 'inherent jurisdiction' for ensuring justice between the litigants, then that court is C seized with jurisdiction not from O 92 r 4 of the RHC 1980 but instead from a residual or implicit or implied form which makes no distinction between civil and criminal cases. However, such an inherent power, which applies across the board, can only be applied within limited circumstances in which it is appropriate for it to be exercised (see para D 34).

(2) The Court of Appeal as a court of finality for cases originating from the subordinate courts must bear in mind that it can only revisit its own decision in exceptional and limited circumstances such as those in E which the pre-conditions as laid down in *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 (*Asean Security Paper*'s case) are satisfied. This is because otherwise it will open the floodgate for cases that had already been decided to be relitigated and would defeat the principle of finality in a case. Since the F facts of the instant case did not fall within any of the pre-conditions set out in the *Asean Security Paper*'s case and since there were no exceptional circumstances to justify a review or rehearing of it there was no need for the court to review the final decision made by it (see paras 38–40).

G **[Bahasa Malaysia summary**

Mahkamah sesyen menyabitkan responden/pemohon ('pemohon'), atas tiga tuduhan merogol dan menjatuhkan hukuman penjara dan sebatan bagi setiap tuduhan dan tempoh pemenjaraan dijalankan serentak. Pemohon merayu ke H Mahkamah Tinggi terhadap sabitan dan hukuman tersebut atas alasan bahawa hakim perbicaraan telah terlewat dalam menulis alasan penghakiman selama hampir sembilan tahun, yang mana kelewatan tersebut menyebabkan salah laksana keadilan, dan bahawa terdapat salah arah yang serius dalam menerima keterangan seorang saksi kanak-kanak untuk menyokong I keterangan pengadu. Mahkamah Tinggi membenarkan rayuan tersebut dan membatalkan sabitan dan hukuman pemohon. Selepas itu, pihak pendakwaan yang merayu ke Mahkamah Rayuan, mengakas keputusan Mahkamah Tinggi dan mengekalkan sabitan dan hukuman yang dikenakan oleh mahkamah sesyen. Memandangkan perkara ini bermula daripada

mahkamah rendah, Mahkamah Rayuan merupakan mahkamah atasan dan tiada lagi hak merayu selanjutnya untuk pihak-pihak tersebut. Pemohon kemudiannya memfailkan permohonan ini meminta agar Mahkamah Rayuan menyemak semula keputusannya dengan menggunakan kuasa sedia adanya di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), yang dilanjutkan kepada Mahkamah Rayuan menurut k 4 Kaedah-Kaedah Mahkamah Rayuan 1994, untuk membatalkan sabitan responden atas tuduhan kedua kerana salah laksana keadilan. Pemohon mengemukakan bahawa Mahkamah Rayuan mempunyai bidang kuasa untuk menyemak semula keputusannya di bawah A 92 k 4 KMT, peruntukan yang sama seperti k 137 Kaedah-Kaedah Mahkamah Persekutuan ('KMP'). Pihak pendakwaan membantah permohonan ini atas alasan bahawa mahkamah tidak mempunyai bidang kuasa untuk menyemak semula keputusannya atau membicarakan semula perkara yang telahpun diputuskan dan bahawa permohonan pemohon di bawah A 92 k 4 KMT tidak boleh dikekalkan kerana perintah tersebut hanya untuk kes-kes sivil dan bukannya kes-kes jenayah seperti kes ini. Isu utama untuk dipertimbangkan dalam permohonan ini ialah sama ada Mahkamah Rayuan boleh menyemak semula keputusannya dengan menggunakan peruntukan prosedur yang sama seperti k 137 KMP apabila Mahkamah Rayuan menjadi mahkamah atasan untuk perkara tersebut.

Diputuskan, menolak permohonan:

(1) Apabila mahkamah seperti Mahkamah Rayuan dibekalkan dengan '*residual jurisdiction*' atau '*implicit or implied jurisdiction*' atau '*inherent jurisdiction*' untuk memastikan keadilan di antara litigan-litigan, mahkamah diberikan bidang kuasa bukan daripada A 92 k 4 KMT tetapi daripada baki atau bentuk yang tersirat yang tidak membataskan antara kes-kes sivil dan jenayah. Walau bagaimanapun, kuasa sedia ada tersebut, yang beraplikasi secara umum, hanya boleh digunakan dalam keadaan terhad yang wajar dilaksanakan (lihat perenggan 34).

(2) Mahkamah Rayuan sebagai mahkamah yang memuktamadkan kes-kes yang bermula daripada mahkamah rendah perlu memahami bahawa mahkamah rayuan hanya boleh menyemak semula keputusannya dalam keadaan luar biasa dan terhad seperti prasyarat yang dipenuhi dalam *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137 (kes *Asean Security Paper*). Sekiranya tidak, maka berlaku kebanjiran kes-kes yang telahpun diputuskan untuk dibicarakan semula dan ini akan menggagalkan prinsip kemuktamadan dalam sesuatu kes. Memandangkan fakta-fakta dalam kes ini tidak terangkum dalam mana-mana prasyarat yang dinyatakan dalam kes *Asean Security Paper* dan memandangkan tidak terdapat

keadaan luar biasa yang membolehkan semakan semula atau perbicaraan semula kes tersebut maka mahkamah tidak perlu menyemak semula keputusan akhir yang dibuat olehnya (lihat perenggan 38–40).]

Notes

For cases on the jurisdiction of the Court of Appeal, see 2(1) *Mallal's Digests* (4th Ed, 2007 Reissue) paras 4381–4383.

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1, FC (refd)

Anantha Kiruisan PSR @ Anantha Krishnan & Anor v Teoh Chu Thong [2008] 4 MLJ 672, FC (refd)

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (folld)

Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 1 MLJ 101; [2005] 4 CLJ 29, FC (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (folld)

Taylor v Lawrence [2002] 2 All ER 353, CA (refd)

Uddin (a child) (serious injury: standard of proof), Re [2005] 3 All ER 550, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 50, 87
Rules of the Court of Appeal 1994 r 4
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 1 r 2(2), O 92, O 92 r 4

Karpal Singh (Karpal Singh & Co) for the appellant.
Mohd Yusof Zainal Abiden (Wong Chiang Kiat with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

James Foong JCA (now FCJ):

BACKGROUND

[1] The applicant was charged with three counts of raping his step daughter who was then slightly over ten years of age. He was convicted on all three charges and was sentenced to ten years imprisonment and two strokes of

rotan on the first charge, 12 years imprisonment and two strokes of rotan on the second charge and, 14 years imprisonment and three strokes of rotan on the third charge. The imprisonment term was ordered to run concurrently.

[2] Dissatisfied with this decision, the applicant appealed against conviction and sentence to the High Court at Kuala Lumpur. One of the issues raised in his appeal was that the sessions court judge had delayed writing her grounds of judgment some nearly nine years after she has delivered her decision. The applicant claimed that this delay has caused injustice to him since 'there was a likelihood that this trial judge's assessment of the witness' demeanour would be blurred'. Further, it was contended that a child witness's evidence should be corroborated.

[3] Accepting these contentions of the applicant, the High Court allowed his appeal and set aside his conviction and sentence. Against this decision, the public prosecutor appealed to the Court of Appeal. The Court of Appeal, after hearing arguments, allowed the appeal and reversed the decision of the High Court. The conviction and sentence imposed by the sessions court on the applicant were reinstated.

THE APPLICANT'S APPLICATION

[4] Despite being aware that the Court of Appeal is the apex court on matters originating from the subordinate court (see s 50 read with s 87 of the Courts of Judicature Act 1964 and the decision of the Federal Court in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201), the applicant filed this application (encl 18A) for the following orders:

> untuk suatu perintah agar Mahkamah Yang Mulia ini menggunakan kuasa-kuasa (inherent power) sedia ada di bawah Aturan 92 Kaedah 4, Kaedah-Kaedah Mahkamah Tinggi, 1980 yang dilanjutkan pemakaiannya kepada Mahkamah Yang Mulia ini menurut Kaedah 4, Kaedah-Kaedah Mahkamah Rayuan, 1994 dan mengenepikan perintah Mahkamah Rayuan dalam Rayuan Jenayah W-09-71-2004 yang membenarkan rayuan Pendakwa Raya terhadap keputusan Mahkamah Tinggi, Kuala Lumpur Rayuan Jenayah No: 42-28-1994 di mana keputusan Mahkamah Sesyen, Kuala Lumpur adalah disahkan oleh Mahkamah Rayuan dan di mana responden dikenakan hukuman penjara dua belas (12) tahun bermula dari tarikh 13hb Mei, 2008 dan dihukum sebatan sebanyak dua (2) kali sebatan rotan, ataupun apa jua perintah lain yang difikirkan patut dan adil oleh Mahkamah Yang Mulia ini.
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> Translated into English:

A for an order that this Court by using its inherent powers under Order 92 rule 4 of the Rules of High Court 1980, which applies to this Court by virtue of Order 4 of the Rules of the Court of Appeal 1994, to set aside the Order of the Court of Appeal in Criminal Appeal No. W-09-71-2004 which allowed the appeal by the Public Prosecutor against the decision of the High Court in Kuala B Lumpur Appeal No. 42-28-1994 and affirmed the decision of the Sessions Court, Kuala Lumpur which sentenced the applicant to 12 years jail term commencing from 13th May 2008 and two strokes of rotan or whatever order as this Court deems fit to grant.

C **[5]** In brief, what the applicant is requesting from this court is to review its own decision given on the 13 May 2008, limited to what I believe is the conviction and sentence on the second charge. This is apparent from para 10 of the applicant's solicitor's affidavit filed in support of this application:

D Clearly, there has been a manifest miscarriage of justice and it is incumbent on this Honourable Court to invoke its powers under Order 92 rule 4 of the Rules of the High Court, 1980 which is extended to the Court of Appeal pursuant to rule 4 of the Rules of the Court of Appeal, 1994 and set aside the conviction of the respondent *on the second charge* since an exceptional case has been made out for it to do so. (Emphasis added.)

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[6] In support of this application, the applicant's solicitors, on behalf of the applicant, gave the following reasons:

F (1) There is a miscarriage of justice as a result of the Court of Appeal decision given on 13 of May 2008.

(2) The learned Judges of the Court of Appeal ought to have, after having accepted that the delay of nine years on the part of the learned trial Sessions Judge to hand down her judgment had seriously prejudiced the G respondent in relation to the first and third charge, equally given the same consideration in relation to the second charge. The evidence of a sole eye witness SP10, Norizan binti Mansor, in relation to the second charge could not in any way alter the position.

H (3) The learned judges of the Court of Appeal seriously misdirected themselves in accepting the evidence of SP10 as corroborating the evidence of the complainant, SP4 Suhailiana bt Ali when the evidence of SP4 was not accepted by the judges of the Court of Appeal in relation to the first and third charge.

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FACTS HIGHLIGHTED

[7] Before I proceed further, I wish to correct what I perceived as a misconception that the learned sessions court judge did not give her decision

in this case until nine years after the trial. From the records, she gave her decision soon after the trial but failed to render her grounds of judgment until a much later date.

[8] Secondly, I wish to highlight that the grounds of judgment of the Court of Appeal handed down on 13 May 2008 was not attached to the affidavit filed in support of this application (though an incomplete copy of this with relevant pages missing is found in tab 23 of the applicant's counsel's bundle of authorities).

ARGUMENT OF THE PUBLIC PROSECUTOR

[9] Objecting to this application, the learned deputy public prosecutor argued that this court is not seized with jurisdiction to review its own decision or to rehear a matter that has already been finally disposed of. Further, since O 92 of the Rules of the High Court 1980 is relied on by the applicant, this application cannot be sustained by virtue of O 1 r 2(2) of the Rules of the High Court which says:

> These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or *in relation to any criminal proceedings*. (Emphasis added.)

JURISDICTION

[10] I shall first deal with the question of jurisdiction.

[11] Through a series of Federal Court decisions, which I append below, the Court of Appeal is determinately the apex court of appeal in cases originating from the subordinate court.

[12] Justice Zaki Tun Azmi PCA (as he then was) in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 declared:

> According to s 50(1), criminal cases decided by the sessions court may be appealed up to the Court of Appeal while those made by the magistrate is also appealable up to the Court of Appeal but only with leave of the Court of Appeal. Section 50 read with s 87 means that, criminal matters originating in the sessions court and the magistrate court must end at the Court of Appeal.

[13] This matter was reiterated in *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 where Chief Justice Abdul Hamid Mohamad said:

A Since there is no further appeal to this court, then the Court of Appeal becomes the apex court as far as actions and suits in respect of motor vehicle accidents are concerned.

B **[14]** And finally, in *Anantha Kiruisan PSR @ Anantha Krishnan & Anor v Teoh Chu Thong* [2008] 4 MLJ 672, Justice Zulkefli FCJ announced:

> ... I would like to state here that at the time of writing down this judgment I had the benefit of reading the judgment of the Federal Court in the two cases of *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* and *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* earlier cited, I wholly agree with the conclusions and the reasonings for arriving at those conclusions made by the three members of the Bench comprising Abdul Hamid Mohamad Chief Justice; Zaki Tun Azmi PCA and Arifin Zakaria FCJ on this issue in the said two cases. In essence Their Lordships were of the unanimous view that r 137 cannot be interpreted to provide another avenue to bring a case originating in the subordinate court to the Federal Court and that cases originating in the sessions court must end at the Court of Appeal. Any injustice or abuse of the process of court as alleged by the defendants in the present application could only be corrected by that court as an apex court.

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E **[15]** All these Federal Court decisions deal principally with the question of whether a matter originating from the subordinate court, having gone through the High Court on appeal and then to the Court of Appeal can still be considered by the Federal Court under r 137 of the Rules of the Federal Court 1995. The answer is positively in the negative.

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[16] Flowing from this is the next question: If such a case ends in the Court of Appeal, can the Court of Appeal review its own decision by using a similar procedural provision as r 137 of the Rules of the Federal Court?

G **[17]** Rule 137 of the Rules of the Federal Court reads as:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

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[18] Though there is no similar provision in the Rules of the Court of Appeal, r 4 of the Rules of the Court of Appeal however says:

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> Where no other provision is made by any written law or by these rules, the procedure and practice in the Rules of the High Court 1980 shall mutatis mutandis apply.

[19] And under O 92 r 4 of the Rules of the High Court, a similar provision as r 137 of the Rules of the Federal Court appears in this manner: A

Inherent powers of the Court (O 92 r 4)

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. B

[20] Based on these corresponding provisions, the applicant's counsel argued that the Court of Appeal is seized with jurisdiction to review its own decision, similar to that practiced by the Federal Court, though rarely, under r 137 of the Rules of the Federal Court. C

[21] The learned deputy public prosecutor disagreed with this contention and highlighted that firstly, O 92 r 4 of the Rules of the High Court only caters for civil cases and not criminal like this case before us. Secondly, even if O 92 r 4 of the Rules of the High Court applies with equal force to the Court of Appeal, this procedural provision has no force of law to confer jurisdiction on the Court of Appeal to review its own decision. D E

ANALYSIS

[22] Undoubtedly by virtue of r 4 of the Rules of the Court of Appeal, O 92 r 4 applies mutatis mutandis to the Court of Appeal. But the question remains: Is the Court of Appeal seized with jurisdiction to review its own decision? The argument put forth by learned deputy public prosecutor is that O 92 r 4 of the Rules of High Court is only a procedural provision which cannot confer jurisdiction on the Court of Appeal, let alone that this rule only applies to civil cases. I shall deal with the latter after finishing with the first. F G

[23] While trying to ward off an attempt to convince the Federal Court to entertain, by way of an appeal or review, a decision of the Court of Appeal in a case originated from the subordinate court, the Federal Court in *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* touched on the effect of procedural law conferring jurisdictional right on a court of law. In paras 8–15 of the judgment, Chief Justice Abdul Hamid Mohamad said: H I

RFC 1995 was made by the Rules Committee in exercise of the powers conferred by s 17 of the CJA 1964. Section 16 read with s 17 in brief, provides that the rules committee may make rules:

(a) for regulating and prescribing the *procedure* (including the method of

A pleading) *and the practice* to be followed in the High Court, the Court of Appeal and the Federal Court in all causes and matters whatsoever in or with respect to which those courts *have for the time being jurisdiction*... and any matters *incidental* or relating to any such procedure or practice...

B (b) For regulating and prescribing the procedure or civil or criminal appeals...

(c) For regulating the enforcement and execution...

and so on.

C Note the underlined words. The rules that the Rules Committee are empowered to make are rules relating to procedure and practice and they are in respect in which the courts 'have for the time being jurisdiction'. The committee is not empowered to make rules to grant jurisdiction to the courts to hear and determine appeals not permitted by statute. Similarly, D other paras of s 16 also do not give such powers to the Rules Committee to make. They too concern 'procedure' not substantive law. Any rule, being a subsidiary legislation, that purports to give a right of appeal not permitted by the Constitution and the CJA 1964 would be ultra vires both the Constitution and the CJA 1964.

E In this respect, Thomson CJ, almost half a century ago, had said in *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 (CA):

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as F here used repeatedly. This leads to the view that in the ordinance there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by G reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.
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> In other words, the powers may be exercised if the court has the H jurisdiction to exercise it in the first place.

In *Dato' Mohamed Hashim Shamsuddin v Attorney General, Hong Kong* [1986] 2 MLJ 112 (SC) Abdoolcader SCJ referred to s 16(1) of the CJA 1964 as a section that provides 'for the regulation and prescription of *curial procedure*, a very apt description indeed, and went on to say: I

> This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting per se to confer jurisdiction where none existed otherwise, and it is this specific enactment

in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specifieds therein". A

[24] The learned Chief Justice then continued: B

A similar stand was also taken by Seah SCJ in his dissenting judgment in the same case:

> In my opinion, it is plain that s 16 of the Act deals with the practice and procedure of the High Court and the Supreme Court subject to the provisos contained in (a) and (b) of sub-s (3) of s 17 of the Act. Section 16 does not deal with the general jurisdiction of the High Court. As such in my opinion, the power given to the rules committee is limited only to making rules regulating and prescribing the practice and procedure to be followed in the courts. C

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[25] Another case cited in support by the Chief Justice is the Federal decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 222, where it was discussed in depth the scope of powers conferred by the Rules Committee, albeit, with reference to the Rules of the High Court: E

The next topic to be logically considered in this context, is the status of the Rules of the High Court 1980.

> By s 17(1) of the Courts of Judicature Act 1964, powers are conferred upon the Rules Committee to make 'rules of court' for the purpose of regulating and prescribing the practice and procedure to be followed in the respective courts for which each of them is constituted but within the strict limits defined by s 16. F

> The most decisive limitation placed on the powers of the Rules Committee, and indeed on other rule-making authorities, is that they extend to regulating the 'practice and procedure' of the High Court and other courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of substantive law. Clearly, there is a vital distinction made between, on the one hand, substantive law, the function of which is to define, create, confer of (or) impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by courts of law or any tribunal *seized with jurisdiction to adjudicate on a dispute before it.* G H

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[26] Finally, the Chief Justice ended declaring that 'r 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes'.

[27] If r 137 of the Rules of the Federal Court which is, and I repeat, similar to O 92 r 4 of the Rules of the High Court which applies mutatis mutandis to the Court of Appeal by virtue of r 4 of the Rules of the Court of Appeal, cannot confer jurisdiction on the Federal Court how then did the Federal Court in the case of *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1 derive jurisdiction to entertain a review of its own decision? Similar to the Court of Appeal, except for r 137 of the Rules of the Federal Court, there is no provision in the Federal Constitution, the Courts of Judicature Act or any Federal Law conferring jurisdiction on the Federal Court to review its own decision.

[28] In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd*, an application was made to the Federal Court to have a decision of the Federal Court reviewed and reheard pursuant to r 137 of the Rules of the Federal Court to prevent injustice or to prevent an abuse of the process of the court. Though Chief Justice Abdul Hamid Mohamad in that case initially reiterated that r 137 of the Rules of the Federal Court does not confer jurisdiction, he conceded:

> However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that *inherent jurisdiction* may be exercised in the following instances: ... (Emphasis added.)

[29] Another member of the panel in same case, Justice Zaki Tun Azmi PCA (as he then was) though agreeing with the views of the Chief Justice that r 137 of the Rules of the Federal Court confers no jurisdiction on the Federal Court to review or rehear its own case *but since it is part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction* subject to valid existing laws including the Constitution then 'that inherent power is found within the very nature of a court of law, unlike power conferred by statute'. (Emphasis added). But he cautioned:

> There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided *that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court*. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. (Emphasis added.)

[30] If the Federal Court is possessed of such inherent power to review or rehear a matter that it has previously disposed of, what about the intermediary level of the Court of Appeal on a matter that cannot be taken further to the Federal Court?

[31] Towards this, the English Court of Appeal case of *Taylor v Lawrence* [2002] 2 All ER 353 renders some assistance. Lord Woolf CJ in deciding that the Court of Appeal has residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances at p 368 said:

> It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court to which we have referred already (The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents) ...
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> In our judgment the final words of Lord Diplock, 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' express the situation here under consideration exactly.

[32] Then at p 369 he said:

> Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.

[33] Similar approach appears in the case of *Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550, where the English Court of Appeal adopted *Taylor v Lawrence* to rule that it has residual jurisdiction to reopen a final appeal provided the case falls within the exceptional category described in *Taylor v Lawrence*.

[34] When a court is armed with 'residual jurisdiction' or 'implicit or implied jurisdiction' or 'inherent jurisdiction' for the 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' then I am of the view that the Court of Appeal is seized with jurisdiction, not from O 92 r 4 of the Rules of the High Court but from a residual or implicit or implied form which naturally makes no distinction between civil and criminal cases. Such inherent power applies across the board save and except within the limited circumstances as forewarned by the authorities cited above.

[35] It has come to my knowledge that another panel of this court has considered a matter of similar nature and arrived at the same conclusion. Unfortunately, I have yet to secure the grounds of judgment of that panel so as to be enlightened by the thoughts of those eminent judges.

PRE-CONDITIONS

[36] To reconcile the need for finality in a case coupled with the danger of injustice caused when the ordinary appeal process has been concluded with that of correcting injustice by allowing a court of finality to revisit its own decision, Chief Justice Abdul Hamid Mohamad in *Asean Security Paper Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* laid down the following stringent conditions to be satisfied before this could be exercised:

> First, where there is a lack of quorum as in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his functions as a judge of that court.
>
> Secondly, where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577.
>
> Thirdly, where there is a clear infringement of statutory law. In this respect, a clear example would be where the court has mistakenly applied a repealed law. But, where it is a matter of interpretation or application of the law, it is in my view not a suitable case for a review. The judgment of this court in *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565 does throw some light in this respect.
>
> Fourthly, where application for review has not been heard by this court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lai Choudhury v Sukhraj Rai and others* AIR 1941.

Fifthly, where bias has been established as in *Taylor & Anor v Lawrence & Anor* [2002] 2 AII ER 353.

Of course, there may be other circumstances. But, the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts.

[37] Justice Zaki Tun Azmi PCA (as he then was) sitting in the same panel added the following pre-conditions not mentioned by the Chief Justice:

(a) The applicant had been denied the right to have his appeal heard on merits by the appellate court (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645).

(b) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101; [2005] 4 CLJ 29).

[38] Aside from these particular guidelines, I must add that this court, as a court of finality for cases originating from the subordinate courts, must always bear in mind that only in exceptional and limited circumstances that such application be allowed otherwise it will open the floodgate for cases that had already been decided to be relitigated. This would defeat the principle of finality in a case. Thus, when considering an application of this sort, I must echo the approach voiced by Justice Zaki Tun Azmi PCA (as he then was) that it should not 'be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy'.

THE MERITS OF THIS CASE

[39] Having perused the facts as presented to us, I am of the firm conviction it does not fall within any of the pre-conditions set out above and neither are there any exceptional circumstances to justify a review or rehearing of it. The points raised by the applicant had been argued before this court on appeal and a decision was accordingly made. I find no reason for this court to order a re-visit particularly when, from what is exposed, there is no injustice caused.

[40] Mr Karpal Singh, leading counsel for the applicant, have brought to my and my colleague's attention that the merits of this application have not been argued; what was raised relates only to jurisdiction. Regrettably we

A disagree. We are of the view that we have considered this application in its entirety and found that the applicant has failed to satisfy the threshold required to allow a review of a final decision of this court previously given.

B CONCLUSION

[41] Accordingly, this application should be dismissed.

C **[42]** My brother Justice Hasan Lah and Justice Sulong Matjeraie have read this judgment in draft and are associating themselves with it.

Application dismissed.

D Reported by Kohila Nesan

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